

8 Official Opinions of the Compliance Board 38 (2012)

- ◆ Exceptions Permitting Closed Sessions
 - ✧ Legal Advice - Generally
 - ✦ Exception extends to public body's receipt of advice but not to deliberations on policy matters
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 - ◆ Closed Session Procedures
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March 16, 2012

Re: Calvert County Board of License Commissioners: Sean Rice

We have considered the complaint of Sean Rice of the Southern Calvert Gazette ("Complainant") that the Calvert County Board of License Commissioners ("Commissioners") violated the Open Meetings Act (the "Act") by meeting in a closed session or sessions to discuss a request for a transfer of a liquor license to a different location.

I

The parties' allegations

Complainant alleges that the Commissioners held a hearing in June, 2011, on a proposed transfer of a liquor license, that they voted in July to defer their decision on the matter until their August meeting, and that, at the August meeting, a member read a pre-prepared decision which the Commissioners then adopted without discussion. Complainant also alleges that one of the Commissioners told the Southern Calvert Gazette that the Commissioners had met in "executive session." Complainant concludes that the Commissioners reached their determination in closed session and that the vote at the public meeting was a mere formality.

The Commissioners state that they properly met in closed session to receive advice of counsel. They have provided four sets of documents. The first, a

transcript of the June meeting, reflects legal issues presented by the transfer application. The second, a transcript of the July meeting, reflects a vote to “have a closed session to discuss with counsel about legal issues involved in [the transfer] matter.” The third set consists of a closing statement and an attachment. The closing statement, dated “7/28/11 and 8/23/11,” cites State Government Article (“SG”) §10-508(a)(7) as the statutory authority for closing the session and “Discussion with legal counsel” as the “reason for closing.” Under the heading, “Topics to be discussed,” the closing statement instructs, “See Attached Exhibit A.” That exhibit is labeled “Closed Meeting Minutes.” It lists meetings on July 28 and August 23, states that the Commissioners discussed legal issues raised by the transfer application, and reflects the presence of counsel. It does not reflect any actions taken. The fourth is a transcript of the Commissioners’ public meeting on August 25. At that meeting, the Chair raised the transfer matter, explained that the Commissioners had “had a closed session meeting to discuss and confer with counsel,” and asked whether there was a motion. A detailed motion promptly ensued. It addressed the legal issues raised by the application, stated certain findings, and proposed a denial of the application. The Commissioners adopted it without discussion. In the Commissioners’ response to the complaint, counsel states that the motion was written with his assistance, but not during the closed sessions.

II

Discussion

The parties’ submissions raise two issues: first, whether the discussion held at the two closed sessions fell within the scope of SG §10-508(a)(7), which permits a public body to close a meeting to the public in order to “consult with counsel to obtain legal advice,” and, second, whether the Commissioners followed the Act’s procedures for closing such a meeting to the public. Neither issue is new to us, and our discussion can be brief.

A. The “legal advice” exception.

SG §10-508(a)(7) is one of fourteen exceptions to the Act’s general requirement that a public body discuss public business in an open meeting. All of the exceptions are to be construed strictly. SG § 10-508(c). We have therefore construed SG §10-508(a)(7) literally – that is, to extend to a meeting with counsel to “obtain” legal advice, but not to the public body’s own discussions of the policy implications of that advice. *See 6 OMCB Opinions 127, 130-31 (2009)*(discussing the scope of the exception). Here, the closed

session minutes, which we do not keep confidential because they are incorporated by reference in the Commissioners' closing statement, refer only to a "[d]iscussion with legal counsel concerning the [transfer application] and legal ramifications and interpretation of [a statute]." If, as might appear to a member of the public, the Commissioners' two closed meetings went beyond the mere giving of legal advice by counsel on the legal issues raised by the transfer application, the Commissioners violated the Act whether or not they actually reached a decision during those meetings.

We caution that a meeting held with counsel to obtain legal advice can easily evolve into a meeting at which the members exchange their own opinions on the matter in question and that the exception evaporates when that point is reached. We further caution – as we have before – that when a public body holds two closed meetings on a matter and then decides the matter, without discussion, on the basis of a lengthy motion, the public body should not be startled when a member of the public infers that every aspect of the matter was discussed and decided in secret.

B. Procedures for closing a meeting to the public.

The second issue is whether the Commissioners followed the correct procedures for closing two sessions to the public. On this issue, we conclude that they violated the Act in two ways: first, by holding two closed sessions on the basis of only one vote to close, and, second, by at least partially preparing their written statement ("closing statement") after the closed sessions.

With regard to the first violation, we have long instructed that SG §10-508(d)(1) requires a public body to vote to close a session shortly before holding that session. In 1 *OMCB Opinions* 73, 83 (1994), for instance, we found that a public body had violated the Act by voting to meet in closed session nine days later. We explained:

In the view of the Compliance Board, a public body may not take a vote at one meeting to close a future meeting. The Act states as follows: "Unless a majority of the members of the public body present and voting vote in favor of closing the session, the public body may not meet in closed session." §10-508(d)(1). In other words, those who are present at the meeting to be closed are the ones who must make the decision to close the meeting and who are held accountable for that decision. Since there is no assurance that the members of a public body who are present at one meeting will be present at

the next, a vote at one meeting to close the next one does not satisfy the statutory requirement.

Id. at 83 (1994). Here, the Commissioners held their second closed session over three weeks after they adopted the motion to “have a closed session to discuss with counsel about legal issues involved in [the transfer] matter.” No member of the public had the opportunity to object to the second session, for the simple reason that the public did not know that the Commissioners intended to hold it. We do not interpret the Act to entitle a public body to “continue” a closed session over a period of weeks without publicly voting to do so; the fact that a meeting is convened to continue discussion of a topic does not except that meeting from the Act.

With respect to the second violation, the presiding officer must, “before the public body meets in closed session,” make a “written statement of the reason for closing the meeting, including a citation of the authority ... and a listing of the topics to be discussed.” SG § 10-508(d)(2). Here, the vote to close occurred at the open session on July 28 and the first closed session occurred that day. Whether any part of the closing statement was prepared that day, however, is questionable in light of the fact that the “closed meeting minutes” for both closed sessions are attached in lieu of a summary of “topics to be discussed.” In any event, that part of the closing statement was clearly prepared after August 23. We refer the Commissioners to our explanation in *7 OMCB Opinions* 225, 226-28 (2011) of the role of the presiding officer in making the written statement, the importance of preparing the statement before the closed session is held, and the level of detail to be provided.

III

Conclusion

In sum, we find that the Commissioners violated the Act’s openness mandate by holding the second closed session without voting to do so in public and without preparing the necessary closing statement. We cannot reach a conclusion on whether the discussion during the two closed sessions went beyond the Commissioners’ receipt of advice of counsel.

Open Meetings Compliance Board

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